

DEC 12 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KIRM GARRET KATH,

Defendant - Appellant.

No. 05-35251

D.C. Nos. CV-04-00169-RFC
CR-02-00055-RFC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted December 5, 2005^{**}

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

Federal prisoner Kirm Garret Kath appeals pro se the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence for fraud and bribery of

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

public officials. Kath contends that under *United States v. Booker*, 125 S. Ct. 738 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), the district court violated his constitutional rights in enhancing his sentence based on judge-found facts. We affirm the district court's denial of Kath's § 2255 motion because *Booker* does not apply retroactively to convictions that became final prior to its publication. *See United States v. Cruz*, 423 F.3d 1119, 1119-20 (9th Cir. 2005) (per curiam).

AFFIRMED.